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89-1551

NO. _____

Supreme Court, U.S.
FILED

MAR 1

1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOHNNY L. POGUE,

PETITIONER

VS.

WHITE STONE BAPTIST CHURCH

and

ROOSEVELT TURNER,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ALABAMA

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March, 1990



QUESTIONS PRESENTED

(1) Whether the action of the Supreme Court of Alabama in affirming the lower court's evidential ruling granting summary judgment in favor of movant parties, in light of Alabama Rule 56(e) summary judgment law requiring sworn and certified papers, is consistent with the due process clause of the XIV Amendment.

(2) Whether statutory §283 of Article 7, Title 6, Code of Alabama 1975, as construed and applied so as to deprive without a hearing of any kind, a party of suit claims sought under a different law of State wide application, is invalid under the XIV Amendment of the United States Constitution in that it punishes the party unevenly and arbitrarily without the statute's purpose.



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QUESTIONS PRESENTED

(1) WHETHER THE ACTION OF THE SUPREME COURT OF ALABAMA IN AFFIRMING THE LOWER COURT'S EVIDENTIAL RULING GRANTING SUMMARY JUDGMENT IN FAVOR OF MOVANT PARTIES, IN LIGHT OF ALABAMA RULE 56(e) SUMMARY JUDGMENT LAW REQUIRING SWORN AND CERTIFIED PAPERS, IS CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE XIV AMENDMENT. (i)

(2) WHETHER STATUTORY §283 OF ARTICLE 7, TITLE 6, CODE OF ALABAMA 1975, AS CONSTRUED AND APPLIED SO AS TO DEPRIVE WITHOUT A HEARING OF ANY KIND, A PARTY OF SUIT CLAIMS SOUGHT UNDER A DIFFERENT LAW OF STATE WIDE APPLICATION, IS INVALID UNDER THE XIV AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT PUNISHES THE PARTY UNEVENLY AND ARBITRARILY WITHOUT THE STATUTE'S PURPOSE (i)

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IN THE
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JOHNNY L. POGUE, PETITIONER
VS.
WHITE STONE BAPTIST CHURCH
and
ROOSEVELT TURNER, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ALABAMA

TO THE HONORABLE CHIEF JUSTICE WILLIAM
H. REHNQUIST, AND ASSOCIATE JUSTICES OF
THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Johnny L. Pogue, prays
that a writ of certiorari issue to review
the opinion of the Supreme Court of
Alabama made in these proceedings on
September 29, 1989. Said Court overruled
Petitioner's application for rehearing on
December 1, 1989.



I.

OPINION BELOW

The Alabama Supreme Court overruled Petitioner's application for rehearing as appears at Appendix A, infra, pp. A. 1-2, without opinion; the opinion released by the Alabama Supreme Court in this case appears at Appendix A, infra, pp. A. 3-13. No opinion was issued by the lower court.

II.

JURISDICTION

The Alabama Supreme Court overruled application for rehearing in this case on December 1, 1989, and released its opinion on September 29, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1, provides:

"****nor shall any state deprive any person of life, liberty, or property



without due process of law****

****nor deny to any person within its jurisdiction the equal protection of the laws."

IV.

STATEMENT OF FACTS

The Petitioner, Johnny L. Pogue, a minister (R.p. 54) and resident citizen of Mobile County, Alabama, filed statutory civil remedy complaint against Respondents in lower Alabama court on June 30, 1987; the complaint was filed pursuant to §6-6-540 et. seq. of Article 12, Title 6, Code of Alabama 1975, for the specific purpose authorized of "Quieting Title And Determination Of Claims To Land." (R.p. 1; A. 4)1/

Petitioner claimed ownership and possession of the subject real property

1/ "R.p." references are to the printed record before the Alabama Supreme Court; "A" are to Appendix attached. The Petitioner has already requested that the record be certified to this Court.



described in the complaint, by virtue of the following factors: Two covenant "indentures" instruments executed by his deceased father grantor, Rev. Bonnie L. Pogue, to grantee Petitioner, on July 30, 1958, and August 28, 1958, recorded in Real Property Book 2837, Page 876, and Real Property Book 2850, Page 869, respectively; (A. 4-5) permissive use and occupation as free tenants at will status Petitioner granted, after father had deceased in 1963, the Respondent Church membership, in accordance with the conditions set out in the indentures; (A. 6; R.p. 33-34; R.p. 36-38; R.p. 41-42; R.p. 44-46) witnessed Certificate instrument executed by White Stone Baptist Church Clerk, on October 2, 1958, recorded in Real Property Book 3256, Page 885, which acknowledged the permissive use and occupation of the property by the Church membership in accordance with the

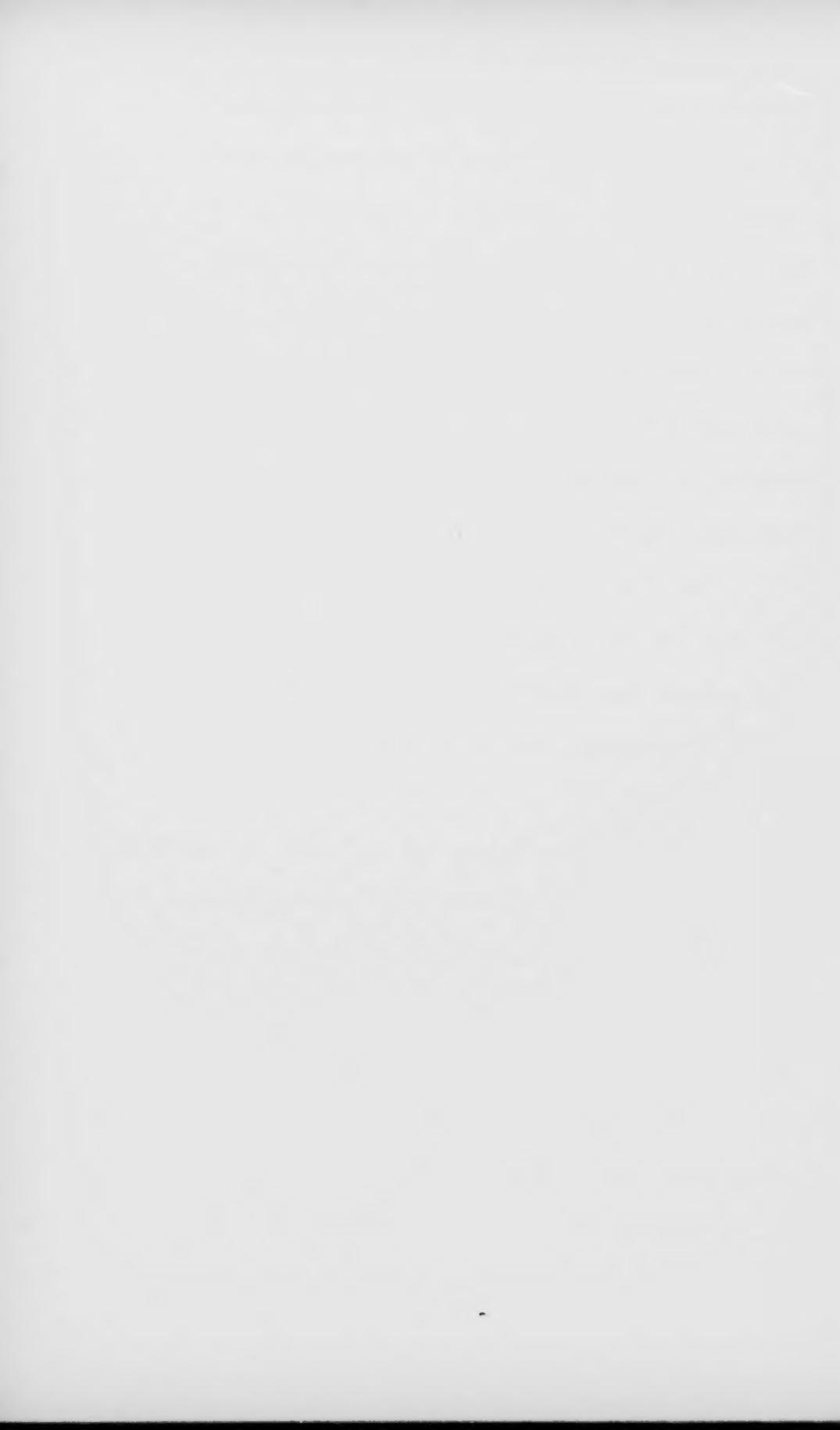


conditions set out in the "indentures"; (R.p. 50; R.p. 53) the Alabama Supreme Court made no mention of this Certificate instrument in its opinion; no other self proving, sworn and certified copies of papers, documents and materials were contained in the record on appeal before the Alabama Supreme Court.

The Respondents claimed ownership of the subject property to be only in the named Respondent, White Stone Baptist Church, an unincorporated name.

(A. 4)

Respondents filed motion for summary judgment against Petitioner's statutory cause of action, which Respondents sought relief as they stated: "as provided in §6-6-283 of Code of Alabama, 1975"; (R.p. 20) the Alabama Supreme Court affirmed the summary judgment granted Respondents (A. 3; A. 13) based upon an



unfactual "letter" from a title
insurance company: (A. 7; A. 11) the title
insurance company "letter" did alleged
"the liability of this report is
limited to the amount paid for same."
(R.P. 65)

Alabama Rule 56 summary judgment
law states:

"(e) Form of Affidavits***"

"****Sworn or certified copies of
all papers or parts thereof
referred to in an affidavit shall
be attached thereto and served
therewith."

Petitioner was given no prior
notice of any hearing and no
opportunity for a hearing, before being
deprived of his suit claims by the
summary judgment granted Respondents.

Petitioner's post judgment motion
for reconsideration denied in lower
court, did aver that the summary
judgment granted Respondents "deprives
Plaintiff of right to present evidence



of witness, due process and equal protection of the laws***see U.S. Constitutional Amendment***XIV."

(R.p. 68)

In its affirmance of the summary judgment, the Alabama Supreme Court quieted title in the unincorporated name White Stone Baptist Church (A. 13), and found no evidence in the appeal record before it of a corporation.

December 1, 1989, the State court of last resort overruled Petitioner's application for rehearing. (A. 2)

V.

REASONS FOR GRANTING THE WRIT

(1) CONFLICT WITH OTHER DECISIONS

In Chambers v. Mississippi, 410 U.S. 284 (1973), this Court held that due process requirements of the XIV Amendment requires the State to adhere to the principles of evidentiary fairness and reliability. In so doing,

the Court took pains to point out that the "State must comply with established rules of procedure and evidence designed to assure both fairness and reliability". (410 U.S. at 302)

The action of the Supreme Court of Alabama in this case, in affirming summary judgment entered respectively in favor of the Defendants, White Stone Baptist Church and Roosevelt Turner, cannot be squared with the (C)hambers requirement; it reciting that "the trial court granted Defendants' motion for summary judgment, based on the pleadings, affidavits, and exhibits", that court has achieved precisely the result outlawed by (C)hambers. The summary judgment affirmance was based upon bare allegations contained in a title insurance company "letter" which the court used as a substitute for evidence in to deprive Petitioner of



entitled suit claim relief. Being the movants for the summary judgment affirmed, the Respondents never filed any affidavit in the court to which any sworn or certified copies of any papers, documents or materials referred to were attached.

In noting the above mentioned uncreditable and impermissible inferences the Alabama Supreme Court even stated (A. 7):

"Copies of the instruments referred to in the Title Insurance Company letter are not included in the record before this Court, except for the 1958 indentures*** Plaintiff's indentures were recorded in Books 2837 and 2850."

Further, the Alabama Supreme Court's opinion made no mention of any evidentiary consideration given to the sworn and certified copy of the Certificate, as executed by the Church Clerk, acknowledging Petitioners' interest in the subject real property as



specified in the above said "indentures" conditions.

Alabama Rule 56(e) summary judgment law, commands that sworn or certified copies of all papers referred to in an affidavit [s]hall be attached thereto. This command itself reflects an acceptance and an understanding of the due process "fairness" and "reliability" requirements spawned by [C]hambers. These requirements simply were not met by Respondents in this case; nor will they ever be met in future situations of this nature if the decision below is allowed to stand.

Summary judgment was entered against Petitioner solely because the sworn and certified evidentiary copies of papers, documents and materials submitted in proof of his complaint, were not ruled upon by the Alabama court in the XIV Amendment context of due



of due process "fairness". See

(C)hambers, 410 U.S. at 302.

The Supreme Court of the United States, in *Adickes v. Kress Company*, 398 U.S. 144, 157 (1970), did declare the Supreme Law of the Land regarding a showing of opposing fact material in a summary judgment proceeding: "for these purposes the material it lodged must be viewed in the light most favorable to the opposing party."

Despite the Alabama Supreme Court's "failure to address the Constitutional issue raised in Petitioner's post judgment motion for reconsideration, on appeal and in petition for rehearing in the Alabama Court of last resort, it is "clear" that Pogues' "asserted denial of due process is properly before" this Court. (*Chambers v. Mississippi*, 410 U.S. at 290)



(2) THE OPINION BELOW RAISES PROBLEMS AS TO THE VALIDITY OF §6-6-283 OF ARTICLE 7, TITLE 6, CODE OF ALABAMA 1975

The affirmance by the Alabama Supreme Court of the summary judgment granted Respondents in lower court under §283 of Article 7, Title 6, Code of Alabama 1975, exceeds the Constitutional limit of the XIV Amendment equal protection of the laws clause which protects individuals, as Petitioner in this case, from being subjected to arbitrary or uneven exercises of power without State statute's purpose.

This Court in its divine analysis in McLaughlin v. Florida, 379 U.S. 184, 195 (1964), regarding the enforcement of a law only within permissible standards, states:

"It does not follow that there is no Constitutional limit to the means which may be used to enforce it."



Petitioner did file action in lower court pursuant to statute of statewide application under §6-6-540 of Article 12, Title 6, Code of Alabama 1975, for the civil remedy procedure and purpose of "Quieting Title And Determination Of Claims To Lands." However, Section 6-6-283 of Article 7, Code of Alabama 1975 through which Petitioner was deprived of his suit claims by the granting of summary judgment to Respondents, by lower court and on affirmance, in pursuance thereof, specified the civil remedy procedure and purpose of "EJECTMENT."

The Alabama Supreme Court affirmed the summary judgment granted Respondents despite there being no prior notice of any hearing, and no opportunity for Petitioner to be heard, in the event the state court would act as it did to deprive Petitioner of his proven suit claims.



In predicating the principle of statutory equal application to the XIV Amendment equal protection clause under the Constitution, this Court stated in (M)cLaughlin, 379 U.S. at 191,

"Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose."

-VI.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Alabama.



Respectfully submitted,
Johnny L. Pogue
Counsel for Petitioner
Post Office Box 537
Mobile, Alabama 36601

March, 1990

EXHIBIT A

MAILING ADDRESS: Telephone: 261-4609

P. O. Box 157
Montgomery, Alabama 36101

Office Of
Clerk Of The Supreme Court
State Of Alabama
Montgomery

Re: 87-1533 White Stone Baptist
Johnny L. Pogue vs. Church, et al.
Appellant Appellee

You are hereby notified that the
following indicated action was taken in
the above cause by the Supreme Court today:
Appeal docketed. Future
correspondence should refer to the
above number.

Court Reporter granted additional
time to file reporter's transcript
to and including

Clerk/Register granted additional
time to file clerk's record/record
on appeal to and including

Appell granted 7 additional
days to file briefs to and
including

Appellant(s) granted 7 additional
days to file reply briefs to and
including

Record on Appeal filed

----- Appendix Filed

----- Submitted on Briefs

----- Petition for Writ of Certiorari
denied. No opinion.

XXXX Application for rehearing overruled.
No opinion written on rehearing.
Per Curiam - Hornsby, CJ., Jones,
Shores, Houston and Kennedy, JJ.,
Concur.

----- Permission to file amicus curiae
briefs granted

12/1/89

bsa

Robert G. Esdale, Clerk
Supreme Court of Alabama



EXHIBIT B

RELEASED

SEP 29 1989

CLERK
SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA - - - - -
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1989

Johnny L. Pogue

87-1533

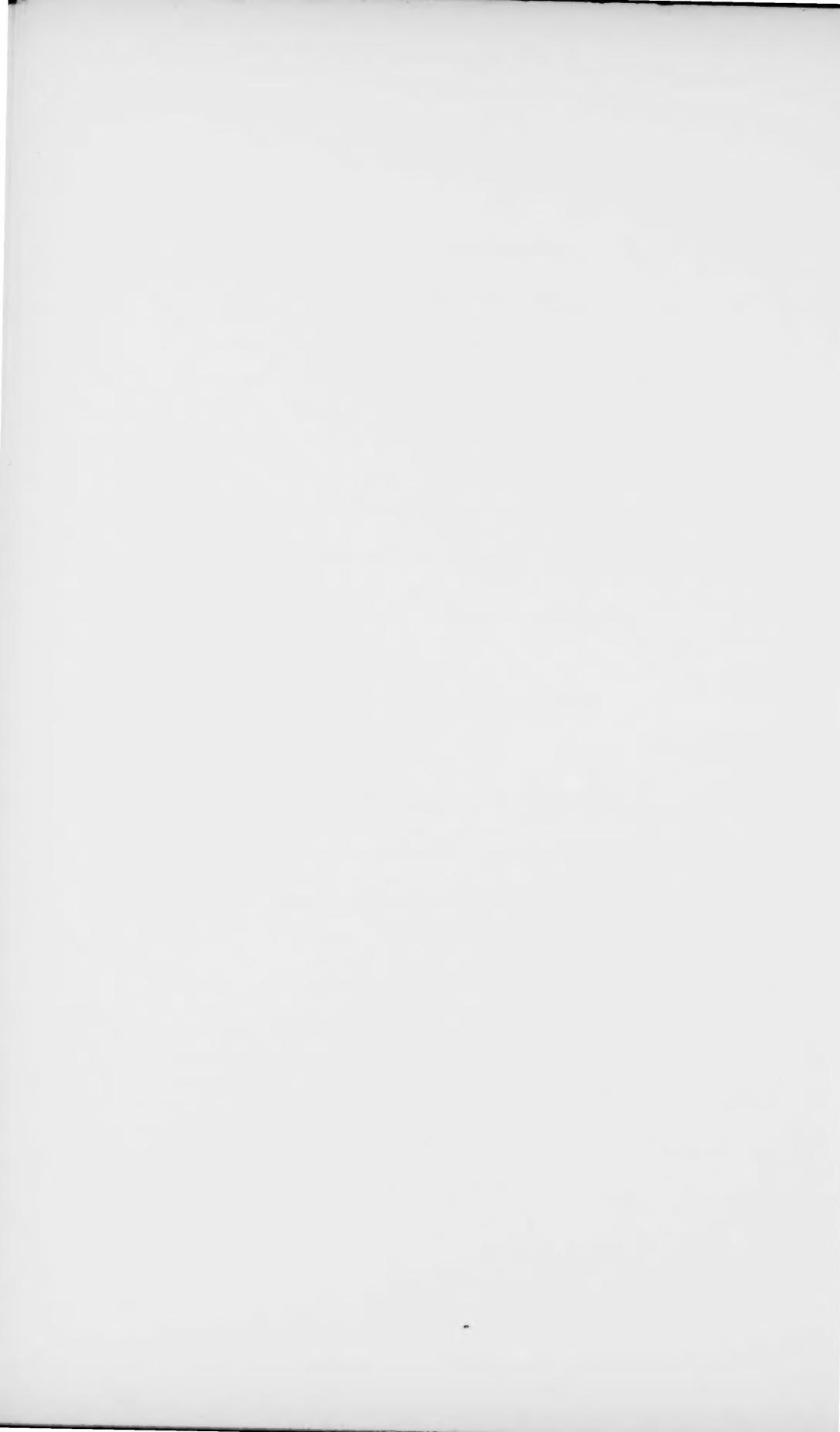
v.

White Stone Baptist Church
and
Roosevelt Turner

Appeal from Mobile Circuit Court
(CV-87-002147)

KENNEDY, JUSTICE.

The plaintiff, Johnny L. Pogue, appeals from a summary judgment entered in favor of the defendants, White Stone Baptist Church and Roosevelt Turner, as trustee. We affirm.



The issues are whether the plaintiff presented substantial evidence necessary to maintain an action to quiet title so as to permit submission to the trier of fact and whether the defendants acquired title to the subject property by adverse possession.

On June 30, 1987, plaintiff, Johnny L. Pogue, filed a complaint pursuant to Code 1975, § 6-6-540 et seq., to quiet title. Plaintiff claimed title in fee simple to real property, occupied and claimed by the White Stone Baptist Church, by virtue of "indentures" or deeds executed on July 30, 1958, and August 28, 1958. The instruments were signed by Rev. Bonnie L. Pogue (plaintiff's father) as grantor and and named plaintiff as grantee. However, these instruments were not recorded until November 6, 1985 (lot 7) and December 6, 1985



(lots 8 and 9), when they were recorded in Real Property Book 2837, at page 876, and Real Property Book 2850, at page 869, respectively. Plaintiff claimed that Rev. Bonnie L. Pogue posted the indentures on the Church's bulletin board and that the indentures remained posted for an undetermined period of time; he claims this, apparently, in an effort to prove that the Church had notice of the conveyances to him in 1958. The Church claimed title by adverse possession by prescription.

The plaintiff alleged that the indenture dated July 30, 1958, gave the Church possession of lot 7 for its use during the life of the grantor (Rev. Bonnie L. Pogue) and gave the plaintiff fee simple title upon the death of the grantor. He further alleged that the August 28, 1958, indenture gave the Church possession of lots 8 and 9 for its use



during the grantor's life and gave plaintiff fee simple title upon the death of the grantor. Both instruments supposedly allowed the Church the use of the premises at the will of the plaintiff, upon his being vested with title. The grantor, Rev. Bonnie L. Pogue, died in 1963. The Church has been in continuous possession of the premises for over 39 years, and mortgaged lots 7 and 8 in 1977 to Mobile Federal Savings and Loan Association (recorded in Real Property Book 1729, at page 835).

On January 6, 1986, plaintiff sent a certified letter to the trustees of the Church, which stated that the tenancy at will was terminated, and he enclosed a proposed lease instrument. The Church claimed title to the property and refused to pay rent and, thus, this lawsuit followed.

The trial court granted defendants' motion for abstract of title pursuant to Code

1975, § 6-6-283. The plaintiff did not provide and abstract as ordered, but, he did file a letter from Title Insurance Company addressed to the plaintiff. The letter indicates that Rev. Bonnie L. Pogue and his wife conveyed lots 7 and 8 by a warranty deed to the trustees of the Church on January 20, 1960. This deed was recorded more than 25 years prior to the recordation of plaintiff's indentures or deeds. The letter also indicated that Rev. Bonnie L. Pogue never had record title to lot 9.¹ Lot 9 was owned by Walter and Christine Parmer, who conveyed lot 9 by a warranty deed to the Church on July 12, 1977. The trial court granted defendants'

¹Copies of the instruments referred to in the Title Insurance Company letter are not included in the record before this Court, except for the 1958 indentures. Nor does the letter indicate the relevant recording dates. However, it does show that the January 20, 1960, deed is recorded in Real Property Book 822, Page 520, and the July 12, 1977, deed is recorded in Real Property Book 3091, Page 792, whereas plaintiff's indentures were recorded in Books 2837 and 2850.

motion for summary judgment, based on the pleadings, affidavits, and exhibits.

Plaintiff, pro se, appealed.

Sections 6-6-540 and -541, Code 1975, set out the right of a person in peaceable possession of land to settle title to the land and set out the contents of the complaint that must be filed.²

²"§ 6-6-540. Right of action to settle title to lands by person in peaceable possession thereof.

"When any person in peaceable possession of lands, whether actual or constructive, claiming to own the same, in his own right or as personal representative or guardian, and his title thereto, or any part thereof, is denied or disputed or any person claims or is reputed to own the same, any part thereof or any interest therein or to hold any lien or encumbrance thereon and no action is pending to enforce or test the validity of such title, claim or encumbrance, such person or his personal representative or guardian, so in possession, may commence an action to settle the title to such lands and to clear up all doubts or disputes concerning the same.

" § 6-6-541. Contents of complaint.

"The complaint authorized by section 6-6-540 must describe the lands with certainty.

"To maintain an action to quiet title to real property, . . . complainant must prove certain facts. If these elements are not proved, the complaint is due to be dismissed unless the evidence shows that title should be quieted in the respondent. Complainant must prove, inter alia, that he was in actual or constructive possession of the property, and that his possession was peaceable as distinguished from scrambling or disputed. It is the character of the possession at the time the suit commenced which is decisive. Furthermore, there must be no suit pending at the time the suit commenced testing respondents' claims.

"One has constructive possession of property when he has a legal estate in fee in the property. And one is in peaceable possession as opposed to scrambling possession when at the time of the suit no other party is denying the fact of complainant's possession."

Note — (Continued)

must allege the possession and ownership of plaintiff and that the defendant claims, or is reputed to claim, some right, title or interest in, or encumbrance upon, such lands and must call upon him to set forth and



Denson v. Gibson, 392 So.2d 523, 524-25 (Ala. 1980) (citations omitted) (emphasis original). '

In this case, the plaintiff failed to offer substantial evidence of the facts necessary to maintain an action to quiet title; thus, his action could not be submitted to a trier of fact. For example, the plaintiff failed to allege peaceable possession, either in his complaint or in his amended complaint, as required by statute.

Even if the plaintiff had alleged peaceable possession, via "constructive possession" (i.e. that he had a legal estate in fee in the property by virtue of the 1958 indentures), his arguments as to lot 9 would fail, because the plaintiff's alleged grantor never had title to lot 9, which

Note — (Continued)

specify his title, claim, interest or encumbrance and how and by what instrument the same is derived and created."



meant that title to that lot could not have been transferred to plaintiff. The evidence viewed in the light most favorable to the plaintiff, and as shown by the Title Insurance Company letter, indicates that a Mr. and Mrs. Farmer had title to lot 9 and that they conveyed their interest in lot 9 to the Church in 1977. As to lots 7 and 8, the evidence, as presented by the affidavits of the trustees of the Church, shows that the Church has been in actual, open, notorious, hostile, continuous, and exclusive possession of the disputed property for over 39 years, and that the Church claims title by the January 20, 1960, deed. A succinct statement of the requirements for the acquisition of title to property by prescription or by adverse possession under the ten-year statutory period (Code 1975, § 6-5-200) is contained in Calhoun v. Smith, 387 So.2d 821 (Ala.



1980). There, the Court stated:

"To obtain land by adverse possession, the claimant must prove 'possession of the land; openness, notoriety and exclusiveness of possession; hostility toward everybody else in respect of possession; holding possession under claim of right or claim of color to title; and continuity for statutory period of ten years.' Tanner v. Thompson 376 So.2d 697, 698 (Ala. 1979). These elements must be proven by clear and convincing evidence.

Knowles v. Golden Stream Fishing Club, Inc., 331 So.2d 253 (Ala. 1976). It should be noted that the elements necessary to prove ownership under the twenty year prescriptive period are the same as those needed to prove adverse possession under the ten year statutory period; the difference between the two is one of burden of proof. Pendley v. Pendley, 338 So.2d 405, 407 n. 2 (Ala. 1976); Fitts v. Alexander, 277 Ala. 372, 170 So.2d 808 (1965)."

Although the plaintiff did not present the evidence necessary to meet the statutory prerequisites of a quiet title action, the defendant Church did, in its response, clearly present evidence that entitled it to a judgment, as a matter of law, quieting



title in it. The evidence, without a genuine issue of material fact, showed that the Church had title, if not by deed, then by adverse possession, either prescriptive or statutory.

Therefore, the Church's summary judgment is affirmed.

AFFIRMED.

Hornsby, C. J., and Jones, Shores, and Houston, JJ., concur.